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Public Prosecutor v Marwan bin Ismail

B HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW NO 43–18 OF 2006
KN SEGARA J
8 DECEMBER 2006

C *Criminal Procedure — Prosecution — Right to conduct prosecution — Validity of prosecution, lawful or unlawful*

D When the accused was first produced before the Magistrate of Shah Alam on 30 November 2006, no plea was recorded by the magistrate in respect of the charge under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA') for the alleged offence of trafficking in 1980g of ganja on 20 November 2006. The magistrate also did not transmit the case to the High Court and hence, the accused was not brought before the High Court as provided under s 41A DDA. Instead, the case was fixed for mention on 22 January 2007. Upon examining the original record of proceedings of E the magistrate, it was discovered that the magistrate had hardly made any relevant record in clear terms to justify the re-mention of the case on 22 January 2007 and had thereby ordered the accused to be remanded in custody for a period of two months from the date of arrest. The magistrate very briefly noted the reason for the adjournment on the first page of the charge sheet (after the date 22 November 2007) F as mention to obtain chemist report. The charge sheet even failed to carry a signature of the DPP or police officer who framed the charge. Issue for the court was whether it was an abuse of process of law for the police/public prosecutor to frame a charge at the 'prosecution's pleasure' without transmitting the case to the High Court.

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Held:

(1) It was clearly an abuse of the process of the law for the police or public prosecutor to frame a charge in the magistrate's court under s 39B(1) DDA and H then detain the accused in custody at the 'prosecution's pleasure' without transmitting the case to the High Court for trial immediately after the accused was produced before a magistrate and the charge read and explained to him in accordance with s 41A DDA. Such detention at the 'pleasure of the prosecution' was unlawful and could expose the Government to a civil suit for damages (see para 9).

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(2) Section 259 CPC was not applicable and therefore cannot be invoked when an accused was produced before a magistrate upon a charge triable exclusively in the High Court as proceedings for transmission under s 41A DDA was neither an inquiry nor trial falling within the contemplation of s 259 CPC (see para 12).

[Bahasa Malaysia summary

Apabila tertuduh dibawa ke hadapan Majistret Shah Alam pada 30 November 2006, tiada rayuan direkodkan oleh majistret berkenaan pertuduhan di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB') bagi kesalahan yang dikatakan mengedar 1980g ganja pada 20 November 2006. Majistret juga tidak memindah kes ke Mahkamah Tinggi dan oleh itu, tertuduh tidak dibawa ke hadapan Mahkamah Tinggi seperti yang diperuntukkan di bawah s 41A ADB. Malah, kes tersebut telah ditetapkan untuk sebutan pada 22 Januari 2007. Setelah memeriksa rekod asal prosiding majistret, didapati bahawa majistret tidak membuat sebarang rekod dalam terma-terma yang jelas untuk memberikan justifikasi sebutan kes bertarikh 22 Januari 2007 dan telah mengarahkan tertuduh yang berada dalam tahanan bagi tempoh dua bulan dari tarikh penahanan. Majistret dengan ringkasnya telah mencatatkan sebab-sebab penangguhan dalam muka surat pertama kertas pertuduhan (selepas tarikh 22 November 2007) sebagai sebutan untuk mendapatkan laporan ahli kimia. Kertas pertuduhan juga gagal menunjukkan tandatangan timbalan pendakwa raya atau polis yang telah membentuk pertuduhan tersebut. Isu untuk mahkamah adalah sama ada ia merupakan satu penyalahgunaan proses undang-undang bagi polis atau pendakwa raya untuk membentuk pertuduhan tersebut atas 'prosecution's pleasure' tanpa menghantar kes ke Mahkamah Tinggi.

Diputuskan:

(1) Adalah jelas merupakan satu penyalahgunaan proses undang-undang bagi polis atau pendakwa raya untuk membentuk satu pertuduhan di mahkamah majistret di bawah s 39B(1) ADB dan kemudiannya menahan tertuduh atas permintaan pendakwa raya tanpa memindah kes ke Mahkamah Tinggi bagi perbicaraan serta merta selepas tertuduh dibawa di hadapan majistret dan caj dibaca dan diterangkan berikutan s 41A ADB. Penahanan seperti ini atas permintaan pendakwa raya adalah menyalahi undang-undang dan boleh mendedahkan Kerajaan kepada guaman sivil bagi ganti rugi (lihat perenggan 9).

(2) Seksyen 259 Kanun Acara Jenayah adalah tidak relevan dan oleh itu, tidak boleh digunakan apabila tertuduh dibawa di hadapan majistret atas pertuduhan yang dibicarakan secara eksklusif di Mahkamah Tinggi kerana prosiding untuk pemindahan di bawah s 41A ADB bukan merupakan satu pertanyaan ataupun perbicaraan yang jatuh di bawah s 259 Kanun Acara Jenayah (lihat perenggan 12).]

Notes

For cases on right to conduct prosecution, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2814–2826.

Legislation referred to

Criminal Procedure Code ss 29, 117, 259, 323
Dangerous Drugs Act 1952 ss 39B(1), 41A

Azar Irwan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

KN Segara J:

[1] The record of proceedings before the magistrate Shah Alam on 30 November 2006 was called and examined pursuant to s 323 of the Criminal Procedure Code ('CPC'), upon my attention being drawn to a newspaper report dated 1 December 2006 regarding an offence of trafficking in dangerous drugs, allegedly committed by the accused.

[2] When the accused was first produced before the magistrate on 30 November 2006, no plea was recorded by the magistrate in respect of the charge under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA') for the alleged offence of trafficking in 1980g of ganja on 20 November 2006. However, the magistrate also did not transmit the case to the High Court and cause the accused person to appear or brought before the High Court, as clearly provided for under s 41A of the DDA. Instead, the magistrate fixed the case for mention again in the magistrate's court, on 22 January 2007.

[3] Section 41A of the DDA reads:

> (1) Where any case in respect of an offence under the Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before the Court as soon as may be practicable.
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> (2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
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> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.
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> (4) The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary

[4] Upon examining the original record of proceedings of the magistrate, it is rather disappointing to say the least that the magistrate had hardly made any relevant record in clear terms, to justify, in law the re-mention of the case before her on 22 January 2007 and thereby order the accused to be remanded in custody for a period of two months from the date of his arrest.

[5] The very brief notation by the magistrate, in the column for the reason for adjournment, on the first page of the charge sheet, after the date 22 January 2007 is as follows:

> Sebutan untuk mendapatkan Lapuran Kimia

[6] The record of proceedings do not show that there was any request from the DPP Samihah Ghazali not to transmit the case to the High Court because the chemist report was not available. The magistrate appears to have acted in a very mechanical manner in fixing a re-mention date. This is not a healthy judicial phenomenon and temperament. Magistrates should resist from such temptations, however busy and pressured they may be in carrying out their duties for the day. The charge sheet does not appear to even carry a signature of the DPP or police officer who framed the charge.

[7] In deciding whether to transmit the case to the High Court, the magistrate should not be concerned with the chemist report. It is for the police and the Public Prosecutor to put their act together when charging an accused, after the police had completed their investigations pursuant to any remand under s 117 of the CPC. If the chemist report was not available to the police, how could the accused be charged in the first place for an offence under the DDA without knowing the nature of the substance in his possession? The accused ought to have been released under s 29 of the CPC.

[8] Section.29 of the CPC reads:

> No person who has been arrested by a police officer shall be released except on his own bond or on bail or under the order in writing of a Magistrate or of a police officer not below the rank of Inspector

[9] It is clearly an abuse of the process of the law for the police/Public Prosecutor to frame a charge in the magistrate's court under s 39B(1) of the DDA and then detain the accused in custody at the 'prosecution's pleasure' without transmitting the case to the High Court for trial immediately after the accused is produced before a magistrate and the charge read and explained to him in accordance with s 41A of the DDA. Such detention at the 'pleasure of the prosecution' is unlawful and could expose the Government to a civil suit for damages.

[10] The warrant of remand issued on 30 November 2006 is set aside and the mention date of 22 January 2007 for the accused to appear before the magistrate is also set aside. The timbalan pendaftar is directed to return the original record of proceedings to the magistrate.

[11] The accused is to be produced forthwith before the magistrate and the magistrate is directed to re-consider whether to transmit the case to the High Court pursuant to s 41A of the DDA or to discharge the accused and release him under s 29 of the CPC after hearing submissions, if any, from the DPP and the accused.

[12] I wish to make it very clear that the provisions of s 259 of the CPC are not applicable and cannot be invoked when an accused is produced before a magistrate upon a charge triable exclusively in the High Court as the said proceedings for transmission under s 41A of the DDA are neither an inquiry nor trial falling within the contemplation of s 259 of the CPC.

[13] Section 259 of the CPC reads:

> (i) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, be order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused if in custody: provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding eight days at a time: provided further that where a Government Medical Officer had certified that a complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.
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> (ii) Every order made under this section by the Court of a Magistrate shall be in writing, signed by the presiding Magistrate, and shall state the reasons therefore

Order accordingly.

Reported by Janani Suntharalingam